No. 80-581

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTERMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY, *Appellants,*

v.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER, *Appellees.*

On Appeal From The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* OF THE STATE OF NEW MEXICO

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STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT.

This brief is filed on behalf of the State of New Mexico by the Attorney General of the State of New Mexico in support of the appellees.

The State of New Mexico levies a severance tax on the production of coal, much of which ultimately enters interstate commerce. New Mexico is concerned that a finding that any specified level of severence tax constitutes an impermissible burden on interstate

commerce will impair New Mexico's ability to determine on behalf of its citizens the proper level of taxation reflecting costs of present and future services, and other impacts and factors related to mineral development. New Mexico further believes that this question is essentially one of legislative policy, within the exclusive purview of the state and national legislatures. We also believe it is important, in view of the Court's order setting down this case with the *Jicarilla* cases, *Merrion et al.* v. *Jicarilla Apache Tribe,* et al, No. 80-11 and *Amoco Production* v. *Jicarilla Apache Tribe,* et al, No. 80-15, in which New Mexico is also *amicus curiae,* to point out the difference between a State's undisputed power to enforce a severance tax and an Indian Tribe's invalid attempt to apply a severance tax to a non-Indian lessee operating under a tribally and federally approved lease. In the latter case, we believe that the nature of the tribe's limited sovereignty over non-Indians, and the federal and tribal approval of a mineral lease, deprive a tribe of the right to impose such a tax.

I. The State's Power To Tax

The nature and extent of a state's power to tax are central to this case, as the nature and extent of an Indian tribe's power to tax are central to the *Jicarilla* cases with which this case has been calendared. The taxing power has been identified as "indispensable" to the very nature and existence of the states. *Railroad Co,* v. *Peniston*, 85 U.S. (18 Wallace) 5 (1873); *Lane County* v. *Oregon,* 74 U.S. (7 Wallace) 71 (1868); *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat) 1 (1824). The origin of that power is not to be found in a specific statutory provision, nor even in the United States Constitution. Rather, it is one of a state's "attributes of sovereignty" which "exists independently of the Constitution of the United States, and underived from that instrument. . . ." *Railroad Co.* v. *Peniston*, 85 U.S. (18

Wallace) 5 (1873); accord, *Ward* v. *Maryland,* 79 U.S. (12 Wallace) 418 (1870). In *Lane County* v. *Oregon,* 74 U.S. (17 Wallace) 71 (1868), the Court explained the historical origin of the states' taxing power: the colonies exercised this function; under the Articles of Confederation the power continued to be exercised without any encumbrances, other than a limitation of non-interference with Congressional treaties; and the Constitution, while creating a power of taxation in the national government, left entire the states' taxing power. Thus, the power of the states to tax "is coextensive with the subjects within their unrestricted sovereign power. . . ." *Ward* v. *Maryland,* supra, at 428. Moreover, there is no different rule for state taxation of mineral lesses of exempt lands. See, *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342 (1949).

II. Judicial Scrutiny Under The Commerce Clause

The limits imposed on a state's taxation of those who exploit its resources are of the greatest concern to New Mexico. Principal among the conflicts engendered by this case is the question whether the Commerce Clause of the Constitution mandates or even permits judicial review of the level of a state's tax. The argument advanced by appellants that state taxes must be scrutinized to determine if their rate or level is appropriate, cannot be limited to any particular level of taxation[1] or to any particular form of taxation.[2] This

[1] The denomination of a tax rate as 30 percent is in itself unilluminating, not only because one must know such factors as the base to which the tax applies, but also because it is difficult to compare the value to which the rate is applied. For example, in respect to coal, anticipated transportation costs will so affect the price received for the mineral that a comparison of percentage rates is unhelpful. See, Church, Conflicting Federal, State and Local Interest Trends in State and Local Energy Taxation; Coal and Copper — A Case in Point, 31 Nat'l Tax J. 269, 272 (1978).

[2] The appellants have attempted to simplify the issue by limiting

scrutiny, if permitted, would represent a fundamental and unwarranted displacement of a state's ability to determine finally its own taxation policies.

The language in recent cases that a tax must be "fairly related to the services provided by the State," *Exxon Corp.* v. *Wisconsin Department of Revenue*, _____ U.S. _____, 100 S.Ct. 2109 (1980), is interpreted by the appellants to permit judicial review of the proper level of taxation. The institutional considerations which militate against judicial assumption of the role urged upon it by appellants are obvious and numerous.[3] The review sought by appellants raises the prospect that courts will be obliged to receive and weigh complex and ambiguous bodies of "evidence" on the question whether a "fair relationship" is present between the "costs" occasioned by industrial activity and the taxes imposed by a state.[4] In response to these

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their attack to one particular type of tax — a severance tax. There would appear to be no conceptual reason why their attack could not include the total tax burden a state might impose on their industry, by other excise taxes, property taxes or corporate income taxes. See, Brief for Appellants at 10. Indeed, an energy corporation might contend that all costs imposed on it by the state, including worker protection and environmental costs, must be included in determining the burden a state imposes on their commerce. See, *id.*

[3] See, Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat'l Tax J. 245, 251 (1978).

[4] There is no agreement on the standards to be applied in this inquiry. First, while the appellants assume that a "fair relationship" requires that taxes be used to cover the immediate costs imposed by their industry, the permissible purpose of taxation has not been so rigidly limited by decisions of this Court. See, *Massachussetts* v. *United States*, 435 U.S. 444 (1978). Second, even if the states were limited to recouping immediate costs, or some similar purpose, there is unlikely to be agreement over what costs are properly compensated, i.e., how are permanent esthetic and scenic injuries or degradation of air or stream quality valued?

considerations, the appellants maintain that the legislative processes are ineffective to protect their interests and that this factor warrants special judicial protection.[5]

The appellants' picture of total exclusion from Montana's political processes is unpersuasive. It should be noted that the appellants themselves claim that Montana's tax policies have[6] or will[7] adversely affect the state's production of coal. The citizens of Montana presumably have an interest in coal production for the benefits of employment and tax revenues it brings them, and will share the appellants' interest at least to that degree. Further, the presence of some of these corporations within the state suggests that they do not lack political impact through the avenues traditionally available to businesses. Also, the state legislature of Montana is not the sole political body with authority over these issues. Congress has also considered legislation addressed to this very issue (see, S. 2695, H.R. 7725, H.R. 7163, 96th Cong., 2d Sess. (1980)) and the competing policy arguments have been presented to it.

III. An Indian Tribe Does Not Possess The Authority To Impose A Severance Tax Upon A Federally And Tribally Approved Lessee.

In distinction to the undisputed power of a state to impose a severance tax on mineral production within its borders, an Indian tribe enjoys no such power in respect to a non-Indian lessee possessing a tribally and federally approved lease.

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[5] Brief for Appellants at 27, 31.

[6] Brief for Appellants at 38.

[7] The appellants' argument at Point III of their brief that Montana's policies frustrate the federal policy to encourage coal use, presupposes a resulting decline in production.

A tribe is a "domestic dependent nation". *Cherokee Nation* v. *Georgia* 30 U.S. (5 Pet.) 1 (1831). In *U.S.* v. *Kagama,* 118 U.S. 375 (1886), this Court declared that Indian tribes were "dependent for their political rights" on the federal government. The Court has subsequently clarified the right of tribes to "make their own laws and be ruled by them". *Williams* v. *Lee,* 358 U.S. 217 (1959). This power of tribal self-government has been construed as broadly controlling internal relations of the tribe, even to the extent of excluding jurisdiction of state laws where their enforcement would infringe upon a tribe's right to govern itself. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973). However, it has been sharply limited in respect to non-Indians, who cannot enjoy membership in the tribe and have no access to its political or cultural institutions. The inability of an Indian tribe to apply its laws to a non-Indian non-member has long been noted. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), the Court struck down an attempt by a tribe to apply its criminal laws to a non-Indian; in doing so it noted that Congress had indicated its belief that Indian tribal law is enforceable only against Indians, not against non-Indians. In that case, the Court described the diminished sovereignty of a Tribe as lacking those powers "inconsistent with their [dependent] status." 435 U.S. at 208.

A similar statement of this interpretation of the limits on a tribe's authority to enforce its laws against non-Indians is laid down in *U.S.* v. *Wheeler,* 435 U.S. 313, (1978), where relations between an Indian tribe and non-members of the tribe are held to fall within an area of "implied divestiture of sovereignty. . . ."

In a situation where a non-Indian possesses a federally-approved lease to enter and do business on tribal lands, the tribe has no governmental power to impose a tax on the lessee. The cases recognizing a limited right in tribes to tax non-Indians do not establish the right to tax such a lessee, as these cases derive from a tribe's unquestioned right as a proprietor of land to exclude non-Indians or non-members from entering on tribal lands, or to regulate the terms of their access to tribal lands. *Maxey* v. *Wright,* 154 S.W. 807 (Ct. App. Ind. Ten. 1900), aff'd, 105 Fed. 1003 (8th Cir. 1900); *Iron Crow* v. *Ogalala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster* v. *Wright,* 135 Fed. 947 (8th Cir. 1905). This Court's recent decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* _____ U.S. _____, 100 S.Ct. 2069 (1980) recognizes but does not enlarge this tribal power to tax non-Indians to regulate and control non-Indian entry upon tribal lands for business purposes, as in the case of business invitees who entered tribal lands to buy cigarettes. These cases have no logical or legal bearing, however, on a situation where a tribe, and its guardian the U.S. Secretary of the Interior, have acted extensively and finally to regulate and define consideration for use of tribal lands and resources. After a tribe has negotiated for, and obtained, and its guardian has approved, terms of a lease providing rents and royalties to a tribe, it cannot be rationally contended that a tribe must be free to exercise a "right" to tax non-Indians in order to limit or regulate access to its territory or resources. To allow a Tribe to tax a captive lessee, i.e. one that cannot pick up its mineral interests and remove with them from the reservation, is to allow it to rewrite the terms of entry by imposing a potentially prohibitive or non-competitive level of taxation. It would create a profoundly uncertain

environment for non-Indian investment in the development of tribal resources, by sending a message to non-Indians that, even after negotiating leasehold terms satisfactory to a tribe, the investor remained subject to unpredictable tribal tax ordinances. These could radically change the economics of the lessee's operation and there would be no effective political recourse for a lessee which cannot, as a non-Indian, participate in the governmental processes of the tribe. It is very hard to see how a tribe's "right" to override its own negotiation and execution of a lease and impose costly new burdens on a non-Indian lessee constitutes a legitimate and necessary part of a tribe's "right to make its own laws and be ruled by them". It is much more similar to certain tribes' recent attempts to market a claimed exemption from state taxation as in the situation addressed by the Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* supra. In that case, the Court clearly held that Indian tribes were never intended to be able to create competitive advantages for sales to non-Indians on tribal lands by asserting that "Tribal self-government" excluded state taxation of the transactions. The claimed right of a tribe to impose a tax upon a non-Indian lawfully holding a federally and tribally approved lease is closely analogous to the claimed right to market enclaves of freedom from state taxes and laws. Both are equally invalid attempts to stretch legitimate attributes of tribal authority into inequitable economic gains at the expense of a tribe's non-Indian neighbors.

CONCLUSION

For these reasons, we respectfully urge the Court to affirm the decision of the Supreme Court of Montana.

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